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08981UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STAN CIPKOWSKI

Appeal 2011-007578
Application 08/981,665
Technology Center 1600

Before DONALD E. ADAMS, LORA M. GREEN, and
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

GREEN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant has requested rehearing of the decision entered February 2, 2012 ("Decision"), which affirmed the rejections of claims 16, 18, and 19 (all of the pending claims) for obviousness. The request for rehearing is denied.

DISCUSSION

Appellant argues that, as "previously pointed out, the primary reference cited in the Section 103 rejection, namely the May reference, discloses a device that is fundamentally different than Appellant's claimed invention" (Req. Reh'g 1). Appellant asserts that the Board's reliance on the language in May that the sample can be placed directly or indirectly on the test strip is misplaced, because in all of the embodiments of May, the front surface of the test strip is prevented from contacting the sample directly (*id.* at 2 (citing Decision, p. 9-10, FF11)).

These arguments are not persuasive. Here, May specifically teaches that a sample may be applied directly to the porous carrier, i.e., the test strip (Decision, pp. 9-10, FF11 (quoting May, p. 3)). Thus, even though all of the embodiments of May are drawn to an indirect application of the sample to the test strip, we do not agree with Appellant that the ordinary artisan would consider that a teaching away from direct application, even though that method of application may not be preferred by May. "[I]n a section 103 inquiry, 'the fact that a specific [embodiment] is taught to be preferred is not controlling, since all disclosures of the prior art, including unpreferred embodiments, must be considered.'" *Merck & Co., Inc. v. Biocraft Laboratories, Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (quoting *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976)). Thus, "[a]ll the disclosures in a reference must be evaluated, including nonpreferred embodiments, and a reference is not limited to the disclosure of specific working examples." *In re Mills*, 470 F.2d 649, 651 (CCPA 1972) (citations omitted). In addition, like our appellate reviewing court, "[w]e will not read into a reference a

teaching away from a process where no such language exists." *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1364 (Fed. Cir. 2006).

Moreover, Appellant's argument, in essence, is that he disagrees with the Decision, but a request for rehearing must do more than re-argue issues that have already been decided, even if the applicant disagrees with the previous decision. A "request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board." 37 C.F.R. § 41.52. An applicant dissatisfied with the outcome of a Board decision is entitled to appeal the decision, *see* 35 U.S.C. §§ 141 and 145, but is not entitled to have the same issue decided multiple times on the same record.

Since Appellant has not pointed out any points that we overlooked or misunderstood, we decline to revisit our earlier conclusions.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REHEARING DENIED

clj